STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 12, 2006
v	No. 257483 St. Clair Circuit Court
RAYMOND WILLIAM DOOLEY, Defendant-Appellant.	LC No. 04-000558-FH

Before: Murray, P.J., and Jansen and Kelly, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial conviction of using the internet for the purpose of attempting to commit third-degree Criminal Sexual Conduct (CSC III), MCL 750.145d. This case arises from defendant's internet exchange with an apparent 14-year-old girl during which he arranged to meet the girl to engage in a sexual relationship. We affirm.

Defendant argues on appeal that 750.145d violates the state and federal constitution in three respects: first, that the statute is overbroad by encompassing constitutionally protected speech; second, that the statute is vague because it fails to provide fair notice of the proscribed conduct; and third, that the statute is vague in that it confers unfettered discretion on the trier of fact to determine whether the law has been violated. This Court reviews de novo a challenge to the constitutionality of a statute under the void-for-vagueness doctrine. *People v Nichols*, 262 Mich App 408, 409-410; 686 NW2d 502 (2004).

Defendant was charged with using a computer for the purpose of attempting to commit CSC III against a minor in violation of MCL 750.145d, which provides in relevant part as follows:

> (1) A person shall not use the internet or a computer, computer program, computer network, or computer system to communicate with any person for the purpose of doing any of the following:
>
> (a) Committing, attempting to commit, conspiring to commit, or soliciting another person to commit conduct proscribed under section . . . 520d . . . in which the victim or intended victim is a minor or is believed by that person to be a minor.

MCL 750.520d provides in relevant part that "[a] person is guilty of criminal sexual conduct in the third degree if the person engages in sexual penetration with another person and if . . . [t]hat other person is at least 13 years of age and under 16 years of age."

Statutes are presumed to be constitutional and must be construed as constitutional unless their unconstitutionality is clearly apparent. *People v Noble*, 238 Mich App 647, 651; 608 NW2d 123 (1999). "There are three grounds for challenging a statute for vagueness: (1) the statute is overbroad and impinges on First Amendment freedoms, (2) the statute fails to provide fair notice of the proscribed conduct, and (3) the statute is so indefinite that it confers unfettered discretion on the trier of fact to determine whether the law has been violated." *People v Rogers*, 249 Mich App 77, 94-95; 641 NW2d 595 (2001). When a statute is challenged on the ground that it is unconstitutionally vague, a court must review the entire text of the law, giving its words their plain ordinary meanings. *Van Buren Twp v Garter Belt Inc*, 258 Mich App 594, 631; 673 NW2d 111 (2003). Defendant argues all three grounds for challenging the validity of MCL 750.145d.

Generally, a criminal defendant may not defend on the basis that a statute is unconstitutionally vague or overbroad where the defendant's conduct is fairly within the constitutional scope of the statute. *Rogers*, *supra* at 95. The overbreadth doctrine is an exception to this rule and allows a defendant to attack overly broad statutes with no requirement that the defendant demonstrate that his own conduct could not be regulated by a statute drawn with the requisite specificity. *Broadrick v Oklahoma*, 413 US 601, 612; 93 S Ct 2908; 37 L Ed 2d 830 (1973). "It thus allows a party to challenge a law written so broadly that it may inhibit the constitutionally protected speech of third parties, even though the party's own conduct may be unprotected." *In re Chmura*, 461 Mich 517, 530; 608 NW2d 31 (2000).

We reject defendant's argument that the statute is overbroad and regulates pure speech. "Facial overbreadth challenges to statutes have been entertained where a statute (1) attempts to regulate by its terms only spoken words, (2) attempts to regulate the time, place, and manner of expressive conduct, or (3) requires official approval by local functionaries with standardless, discretionary power." *Rogers*, s*upra* at 95-96, citing *Broadrick*, *supra* at 612-613. When reviewing an overbreadth challenge to a statute which regulates in the area of the First Amendment, this Court must to look to the statute to determine whether it regulates only spoken words, rights of association or communicative conduct. *People v Taravella*, 133 Mich App 515, 519-520; 350 NW2d 780 (1984), citing *Broadrick*, *supra* at 615. Where conduct and not merely speech is involved, the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep. *Broadrick*, *supra* at 615.

Although MCL 750.145d involves a speech component, we conclude that it is clearly targeted at conduct as opposed to pure speech. This Court addressed the constitutionality of a very similar statute in *Taravella*, *supra*. In *Taravella* the defendant argued that Michigan's misuse of communications services statute, MCL 750.540e, was facially overbroad. *Id*. at 518-519. The statute made it a crime to "maliciously use[] any service provided by a communications common carrier with intent to terrorize, frighten, intimidate, threaten, harass, molest or annoy any other person." *Id*. at 518. This Court concluded that the "terms of the statute are not directed at the restriction of the communication of thoughts or ideas but are aimed at the regulation of specific conduct: the malicious use of communicate services." *Id*. at 520-

521. Similarly, we conclude that 750.145d is not directed at the regulation of the communication of thoughts, ideas or core political speech, see *In re Chmura*, *supra* at 534, but is instead aimed at specific conduct: the "use [of] the internet or a computer, computer program, computer network, or computer system to communicate with any person for the purpose" of committing a specific crime. MCL 750.145d. Moreover, the statute serves the compelling state interest of protecting the state's citizens from sexual attack. Accordingly, defendant must demonstrate that the statute is substantially overbroad.

A facial challenge on overbreadth grounds may be successful if substantial overbreadth is illustrated and there is "a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court." *Rogers*, *supra* at 96, quoting *Los Angeles City Council v Taxpayers for Vincent*, 466 US 789, 801; 104 S Ct 2118; 80 L Ed 2d 772 (1984). "The 'mere fact that one can conceive of some impermissible applications of a statute is not sufficient to render it susceptible to an overbreadth challenge.'" *Rogers*, *supra* at 96, quoting *Los Angeles City Council*, *supra* at 800.

We conclude that MCL 750.145d(1)(a) is not substantially overbroad because its application is limited to individuals who act with the purpose of committing or attempting to commit a specific criminal act. See *Taravella*, *supra* at 521. Before the statute can be violated, a defendant must believe that he or she is communicating with a minor and the communication must be made with the purpose of sexually victimizing or attempting to sexually victimize the minor in violation of MCL 750.520d. The provision of the statute defendant challenges, MCL 750.145d(1)(a), is focused on the "use" of computers and the internet as a means for locating and targeting children for sexual victimization. The statute is narrowly drawn to only encompass communications made in furtherance of a criminal purpose. See *People v Cyr*, 113 Mich App 213, 230; 317 NW2d 857 (1982) (finding a statute prohibiting conspiracy was not overbroad and as not implicating speech because the statue criminalizes an agreement made with the intent to accomplish the substantive offense, not the words used to form the agreement).[1] Accordingly, MCL 750.145d(1)(a) is not substantially overbroad and "to the extent that an overbreadth problem should arise, the appropriate remedy is to handle such cases on an individual basis to prevent any restriction on constitutionally protected speech rather than striking down *in toto* a statute prohibiting constitutionally unprotected conduct." *Taravella*, *supra* at 521-522.

Moreover, we conclude that the statute is not unconstitutionally overbroad as applied to defendant because his conduct clearly falls within the bounds of behavior the statute was designed to prohibit. Defendant used the internet to locate an apparently fourteen-year-old girl and arranged to meet her for the purpose of engaging in a sexual relationship. His intent was sufficiently demonstrated by the fact that he told the intended victim that he would penetrate her,

[1] Defendant argues that a hypothetical person using the internet to locate young girls in order to lecture them on a more virtuous way of life would not be prosecuted under the statute even though that person would have committed the same proscribed acts as he did. However, defendants hypothetical actor could not be found guilty under the plain language of the statute because that person was not using the internet with the purpose of committing one of the crimes outlined in MCL 750.145d(1)(a).

wanted her to perform oral sex on him, would perform oral sex on her, arranged to pick her up when her parents would be out of the house, drove over fifty miles to a prearranged meeting place and finally came to the front door looking for the intended victim. Because defendant's conduct clearly falls within the bounds of the behavior the statute was designed to prohibit, its application to defendant was not overbroad.

Defendant also argues that the statute did not afford him fair notice of the conduct proscribed because it does not establish whether use of the internet alone constitutes commission of the offense and it is impossible to tell when exactly defendant violated the statute. A statute provides fair notice when persons of ordinary intelligence have a reasonable opportunity to know what is prohibited. *Noble*, *supra* at 652. A statute cannot use terms which require persons of ordinary intelligence to speculate regarding its meaning and differ about its application. *People v Sands*, 261 Mich App 158, 161; 680 NW2d 500 (2004). Thus, a statute "is sufficiently definite if its meaning can fairly be ascertained by reference to judicial interpretations, the common law, dictionaries, treatises, or the commonly accepted meanings of words." *Noble, supra* at 652.

We conclude that the statute is sufficiently definite for a reasonable person of ordinary intelligence to understand what conduct is prohibited. The statute quite clearly proscribes using a computer or the internet for the purpose of attempting to commit CSC III. MCL 750.145d(1)(a). The intent requirement contained in the statute sufficiently narrows its application to those who use a computer or the internet for a specific purpose and this meaning is readily apparent to a reasonable person of ordinary intelligence. Contrary to defendant's suggestion, no reasonable reading of the statute prohibits the use of the internet alone.[2]

Affirmed.

/s/ Christopher M. Murray
/s/ Kathleen Jansen
/s/ Kirsten Frank Kelly

[2] Finally, we have previously rejected the argument that the statute confers unlimited discretion on the courts and police officers because the statue requires speculation as to the offender's intent. This Court has previously concluded that the mens rea contained in MCL 750.145d limits the trier of facts discretion in determining whether the statute has been violated. *People v Tombs*, 260 Mich App 201, 220; 679 NW2d 77 (2003), citing *New York v Ferver*, 458 US 747, 765 766; 102 S Ct 3348; 73 L Ed 2d 1113 (1982) and *People v Perex-Deleon*, 224 Mich App 43, 49-51; 568 NW2d 324 (1997).